No. 95-1263

In the Supreme Court of the United States

OCTOBER TERM, 1995

CATERPILLAR INC.,

Petitioner,

v.

JAMES DAVID LEWIS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

REPLY BRIEF FOR THE PETITIONER

JAMES B. BUDA
Caterpillar Inc.
100 N.E. Adams St.
Peoria, IL 61629-7310

WILLIAM F. MAREADY
Robinson Maready Lawing & Comerford, L.L.P.
380 Knollwood St.
Suite 300
Winston-Salem, NC 27103

KENNETH S. GELLER*
MICHAEL R. FEAGLEY
JOHN E. MUENCH
CHARLES ROTHFELD
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

LESLIE W. MORRIS II
Stoll, Keenon & Park, LLP
201 E. Main St.
Suite 1000
Lexington, KY 40507

**Counsel of Record*

12 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY BRIEF FOR THE PETITIONER

Respondent's brief reveals two crucial areas of common ground between the parties in this case. First, Lewis now agrees with Caterpillar that the district court had jurisdiction to decide the case. He has totally abandoned the sole argument that he made below and in his opposition to the petition for certiorari, and the sole argument endorsed by the court of appeals — that the district court lacked jurisdiction at the time of judgment. Instead, implicitly conceding that there is no *jurisdictional* defect requiring remand of the case to state court, Lewis now contends, for the first time, that the federal removal statute independently grants plaintiffs an absolute *statutory* right to a remand whenever removal was improper. Lewis acknowledges (at Br. 7 n.3), however, that he did not make this argument below or in his opposition to the petition. We explained in our opening brief (at 13 & n.4) that this failure forecloses Lewis from making the argument now; Lewis cannot explain why that rule of waiver should not apply here.[1]

---

[1] Lewis argues that if the Court is unwilling to entertain his new argument it should dismiss the petition as improvidently granted "because there would then remain nothing to litigate." Resp. Br. 7 n.3. This contention is sophistry. The petition for certiorari squarely posed the sole question decided by the court of appeals: whether judgment must be vacated "due to an alleged lack of diversity of citizenship at the time of the removal when the nondiverse party was dismissed from the action prior to trial." Pet. i. Lewis responded in opposing the petition (as he had in the court of appeals) that remand was necessary because a district court lacks *jurisdiction* to decide a case whenever diversity was not complete at the time of removal, even if complete diversity attached prior to trial. See, *e.g.*, Br. in Opp. 6 ("there is a lack of subject matter jurisdiction"). In reliance on this argument, much of Caterpillar's opening brief is devoted to establishing that the district court had jurisdiction to decide the case. Lewis's present recognition that his jurisdictional argument lacks merit does not entitle him to advance a wholly new statutory argument for the first time in this Court — and his abandonment of the contention he relied

(continued...)

Second, Lewis evidently recognizes the central reality of this case: that his approach would lead to an enormous waste of judicial resources, as years of proceedings and a six-day trial are thrown onto the trash heap. Thus, candor forces Lewis to acknowledge that Caterpillar's approach — which would avoid this huge inefficiency — is "superficially appealing," "desirable," and "attractive." Resp. Br. 1, 36. With this as background, the issue here is presented starkly: whether anything in the removal statute requires the Court to set aside the district court's judgment and remand the case for a new trial, even though Lewis (by hypothesis) received a fair trial[2] before a competent court that had jurisdiction to decide the case.

Nothing in the removal statutes addresses that question directly. But the answer nevertheless is plain. The structure of the removal provisions indicates clearly that Congress intended to preclude unnecessary relitigation. This Court's decisions in the area have eschewed a "hypertechnalism" that would defeat the imperatives of efficiency, economy, and finality. And Lewis simply cannot explain why he should get a new trial when the jurisdictional defect of which he complains was cured years ago. He accordingly cannot mount a persuasive defense of the judgment below.

---

[1](...continued)
upon below surely does not entitle him to dismissal of the writ as improvidently granted. Moreover, as Lewis himself recognizes (at Resp. Br. 7 n.3), his contention that Caterpillar did not raise its current argument prior to the rehearing stage in the court of appeals "may be deemed waived" because it was not presented in the brief in opposition. Sup. Ct. R. 15.2.

[2] We do not contend, as Lewis asserts (Resp. Br. 6 n.2), that he "had no objections to the conduct of the federal court proceeding." But his argument here does not turn on those objections; his rule would require the Court to set aside the results of a concededly error-free trial. If the Court reverses the court of appeals' judgment, Lewis's objections to the conduct of his trial may be addressed by the court of appeals on remand.

1. Lewis's principal contention is that a remand is compelled by the language of 28 U.S.C. § 1447(c), which provides in relevant part that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." Focusing on the word "shall," Lewis insists that "remand is **mandatory**" when jurisdiction did not exist at the time of removal. Resp. Br. 14 (boldface in original). But this argument rests on a plain misreading of the statute. Section 1447(c) states the black letter rule that a federal court cannot entertain a claim when it "*lacks* subject matter jurisdiction" (emphasis added); in such circumstances, the statute provides that a removed case must be remanded to state court. Here, however, the district court concededly *did not* lack jurisdiction at the time of trial and judgment, and this Court *does not* lack jurisdiction now. In insisting upon a remand, Lewis reads the statute as though it says that cases must be remanded when the district court "*lacked* jurisdiction *at the time of removal*." But that is not what the statute says, and its actual language does him no good at all.

Lewis also is wrong in his reliance on Section 1446(b), which provides that "a case may not be removed on the basis of [diversity of citizenship] more than 1 year after commencement of the action." See Resp. Br. 18-19. This case *was* removed within one year of the initiation of suit. Of course, we assume for purposes of this argument that the removal at that time was wrongful. But Section 1446(b) simply does not speak to that situation.

In fact, the history of the provision — which Lewis does not address — demonstrates that respondent draws precisely the wrong conclusion from Section 1446(b). The 1988 amendment to the provision, which created the one-year limit on diversity removals upon which Lewis relies, did so "as a means of reducing the opportunity for removal after substantial progress has been made in state court." H.R. REP. 100-889, 100th Cong., 2d Sess. 72 (1988). Congress explained:

> The amendment addresses problems that arise from a change of parties as an action progresses toward trial in state court. The elimination of parties may create for the first time a party alignment that supports diversity jurisdiction. Under [unamended] section 1446(b), removal is possible whenever this event occurs, so long as the change of parties was voluntary as to the plaintiff. * * * *Removal late in the proceedings may result in substantial delay and disruption.*

Ibid. (emphasis added). The amendment creating the one-year limit thus was intended to prevent the disruption of proceedings that have progressed significantly. Here, of course, it is *Lewis's* approach that would frustrate this purpose by causing obvious delay and disruption of proceedings that are substantially *complete*.

2. The 1988 amendment of Section 1446(b) is of a piece with other removal provisions in a crucial respect: as we explained in our opening brief (at 15-17), Congress crafted the removal statutes to encourage economy and limit delay, thus aiding "the prompt and efficient resolution of controversies based on state law." *Carnegie-Mellon University* v. *Cohill*, 484 U.S. 343, 353 (1988). Lewis makes no response to this argument.

Instead, he offers the boilerplate observation that federal jurisdiction is narrowly construed so as to "limit[] the ability of state court defendants to impinge on state sovereignty." Resp. Br. 12; see *id.* at 23-25. But this hoary chestnut does Lewis no good here; whether or not federal jurisdiction is construed narrowly as a general matter, the existence of federal jurisdiction in this case is conceded. Indeed, we explained in our opening brief (at 18) that where complete diversity exists (as it did here at the time of trial) federal court is the presumptively better forum for the resolution of the case. Again, Lewis does not answer this point. To the contrary, his brief can be read to suggest that he seeks a new

trial in state court because he may there benefit from "local favoritism." See Resp. Br. 22-23.

In any event, the Court repeatedly has refused to remand removed cases to state court when doing so would disrupt ongoing or substantially completed proceedings. See, *e.g.*, *Grubbs* v. *General Electric Credit Corp.*, 405 U.S. 699 (1972); *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283 (1938). Its decisions find support not only in the structure of the removal statute, but also in a broader principle: that "'some consideration must be given to practicalities.'" *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U.S. 826, 837 (1989) (citation omitted).[3] And here, those practicalities preclude a remand.

That principle applies with particular force here because the district court's error did not involve any independent policy of the removal statute; instead, the district court made a mistake in its application of the jurisdictional rule set out in 28 U.S.C. § 1332. Yet as we explained in our opening brief, and as Lewis now evidently recognizes, Section 1332 does *not* require dismissal of the federal suit so long as an error of this sort is cured. That being so, when the requirement of the removal statute at issue (that there be jurisdiction in the district court) merely mirrors the requirement of the jurisdictional statute itself, it would be perverse if the cure were sufficient for jurisdictional purposes but not for statutory removal purposes.

---

[3] Lewis insists (Resp. Br. 17 n.4) that *Newman-Green* has no bearing here because it did not involve removal. But *Newman-Green* speaks directly to the policy invoked by respondent. In that case, as in this one, federal jurisdiction did not exist at the time the case entered federal court. Indeed, in *Newman-Green* jurisdiction did not exist even at the time the case was tried. But this Court did not find that principles of federalism or comity required dismissal of the suit; instead, the Court concluded that it would avoid a "waste of time and resources" by allowing the case to remain in federal court once the jurisdictional defect was cured. 490 U.S. at 838.

3. Lewis nevertheless insists that "judicial efficiency" is not "a sound basis for construing the removal statutes" and that a showing of "prejudice" is not necessary for a plaintiff in his circumstances to prevail on appeal. Resp. Br. 24-25. In making this argument, however, he offers no response at all to the observation in our opening brief (at 14-15, 18-19) that harmless error rules apply in this area. Nor does he contend that he was prejudiced in any way by the fact that diversity did not become complete until some time after removal. Cf. *Newman-Green*, 490 U.S. at 838. Nor, apart from his insubstantial statutory argument, does he even attempt to explain why an error that *has been cured* should lead to a remand. These failures are unsurprising, for Lewis's premise is fundamentally wrong: the Court has recognized that the removal statutes *are* designed to promote "the values of economy, convenience, fairness, and comity." *Carnegie-Mellon University*, 484 U.S. at 353.

Lewis's one attempt to demonstrate that his approach will further those values is simply silly. He asserts that, if the judgment below is reversed, "defendants will have every reason to remove to federal court, in the hope that some subsequent developments, such as the eventual dismissal of nondiverse defendants, will permit that case to be kept in federal court and thus immunize an initial erroneous removal ruling from challenge on appeal." Resp. Br. 21; see *id.* at 19. But it hardly can be likely that defendants will knowingly remove a case in which federal diversity jurisdiction is lacking (risking sanctions and irritating the trial court), in hopes that the district court will decide the removal question incorrectly *and* that diversity later will come about — with the knowledge that if the district court commits this invited error and diversity does not become complete, the judgment will be vacated on appeal and they will face trial in state court after all. The Court should not premise its decision on the prospect that litigants will act on the basis of this Rube Goldberg chain of contingencies.

4. Caterpillar's position here draws substantial support from *Grubbs*. There, a case was improperly removed to federal court, where the suit was tried to judgment. Nonetheless, this Court held that the case should not be remanded, notwithstanding the improper removal, because "whether or not the case was properly removed, the District Court did have jurisdiction of the parties at the time it entered judgment." 405 U.S. at 700. *Grubbs* therefore inarguably stands for the proposition that removal errors do not necessarily require a remand.

Lewis offers two grounds on which to distinguish *Grubbs*. The first, however, is wrong as a factual matter. He asserts that Caterpillar "concedes [that] the lawsuit [in *Grubbs*] could have been removed to federal court when it was filed." Resp. Br. 16. In fact, that is not so. As we explained in our opening brief (at 14-15 n.6), there was *no* statutory basis on which the case could have been removed. *Grubbs* involved a suit brought in state court by an out-of-state plaintiff against an in-state defendant; while the parties were diverse, removal on diversity grounds was unavailable because the defendant was a resident of the forum state. See 28 U.S.C. § 1441(b). Accordingly, in *Grubbs*, as in this case, the suit was unremovable at the time it entered federal court.

Second, Lewis insists that the principle of *Grubbs* applies only when there was "express or implicit consent by the judgment loser to removal." Resp. Br. 18. But as we also explained in our opening brief (at 15 n.6), it made sense in *Grubbs* for the Court to observe that the case had been removed without objection; there, the removal error — the mistaken invocation of 28 U.S.C. § 1444 by the United States, a third-party defendant — never had been corrected. Here, of course, the error *was* cured after removal and the ground for Lewis's objection accordingly was rendered nugatory.

5. Finally, Lewis misunderstands our argument when he asserts that we would require plaintiffs to seek certification

for interlocutory appeal under 28 U.S.C. § 1292(b) as a prerequisite "for the preservation of the defense of lack of subject matter jurisdiction." Resp. Br. 27; see *id.* at 25-36. Our point is that Lewis *could have* sought certification, which has been granted on removal questions in the Sixth Circuit. Having failed to do so, we continued, Lewis effectively forfeited his right to pursue the issue because complete diversity attached prior to his appeal after judgment. See Pet. Br. 20. Of course, had diversity never become complete, Lewis would have been free to raise his argument on appeal after judgment (and, indeed, the court of appeals would have been required to raise the issue on its own motion had Lewis failed to do so). But diversity did become complete, and Lewis's claim accordingly has been rendered moot.

In sum, Lewis offers no plausible basis for upholding the decision of the court of appeals. He has not defended the Sixth Circuit's jurisdictional rationale. His alternative statutory argument both has been waived and is insubstantial. And he cannot offer any plausible justification for a rule that requires a new trial when the error about which he complains was cured long ago. In these circumstances, Lewis's defense of the Sixth Circuit's hypertechnical and counterintuitive rule should be rejected.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

JAMES B. BUDA
Caterpillar Inc.
100 N.E. Adams St.
Peoria, IL 61629-7310

WILLIAM F. MAREADY
Robinson Maready Lawing
& Comerford, L.L.P.
380 Knollwood St.
Suite 300
Winston-Salem, NC 27103

KENNETH S. GELLER*
MICHAEL R. FEAGLEY
JOHN E. MUENCH
CHARLES ROTHFELD
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

LESLIE W. MORRIS II
Stoll, Keenon & Park, LLP
201 E. Main St.
Suite 1000
Lexington, KY 40507

**Counsel of Record*

AUGUST 29, 1996